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No. 95-1315

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

METROPOLITAN EDISON CO.,
PENNSYLVANIA ELECTRIC CO.,
JERSEY CENTRAL POWER & LIGHT CO.,
GENERAL PUBLIC UTILITIES CORP.,
BABCOCK & WILCOX CO.,
MCDERMOTT INC.,
DRESSER INDUSTRIES, INC.,
RAYTHEON CONSTRUCTORS INC.,
BURNS & ROE ENTERPRISES, INC.,

Petitioners,

v.

JONATHAN W. DODSON, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO "RESPONDENTS' BRIEF IN OPPOSITION TO PETITION"

Respondents' "Brief in Opposition to Petition" presents a series of *non sequiturs* and misstatements which, when revealed, serve only to confirm the need for review by this Court.

Respondents argue (at 6) that in this case of first impression under the Price-Anderson Act, as amended in 1988, no court has agreed with Petitioners that this case presents an issue of exceptional importance. Because this *is* a case of first impression, that is a truism, nothing more. However, instead of attempting to show why the issue presented in this case is not important, Respondents offer only a merits argument, that the issue was decided correctly. That argument rests on four fallacies.

First, Respondents contend (at 7-8) that the statutory definition of "public liability" as including "*any* legal liability" requires the conclusion that "the plain meaning of the Amendments Act is to permit punitive damages." As we showed in the Petition, however, the breadth of the statutory definition of "public liability" (42 U.S.C. § 2014(w)) does not mean that punitive damages must be available; it means, rather, that their availability *vel non* must be assessed in light of the insurance, indemnity, limit of liability *and* rules of decision provisions of the Act.

Second, Respondents assert (at 8) that a "prohibition of punitive damages awards was withdrawn from" an earlier version of the 1988 Amendments Act. This is a misstatement. The rejected proposal was not one to prohibit punitive damage awards entirely, as stated by Respondents. Rather, the proposal "would have prohibited use of either private financial protection or government indemnity funds available under the Act to pay punitive damage awards." H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1, at 19 (May 21, 1987). *That* proposal was rejected, to avoid any question whether the Act "subjected NRC licensees and DOE contractors to unlimited liability for punitive damages, thereby undermining one of the primary tenets of the Act." *Id.* This congressional action, far

from suggesting that punitive damages are necessarily consistent with the Price-Anderson Act, suggests precisely the opposite. Indeed, explaining this action, the same Committee Report declared:

> [T]he Committee remains opposed to punitive damage awards in connection with claims arising under the Price-Anderson Act because such awards could have the effect of diminishing the limited funds available to compensate actual injuries.

Id.

Third, Respondents emphasize the following language from S. Rep. No. 70, 100th Cong., 1st Sess. 27 (June 12, 1987), *reprinted in* 1988 U.S. Code Cong. & Ad. News 1424, 1440, concerning what became 42 U.S.C. § 2210(s): "This provision does not preclude the award of punitive damages. . . ." By their emphasis, Respondents evidently intend to draw attention away from the immediately following sentence: "The Committee intends no preference, for or against the awarding of punitive damages in suits against [NRC licensees], be inferred from the inclusion of this provision in the bill." *Id.* Yet it is precisely such a preference for permitting punitive damage awards that Respondents then claim from this history. The only logical inference from the passage as a whole, however, is that Congress left it to the courts to decide, case by case, whether particular state law punitive damage rules were consistent or inconsistent with the purposes of the Price-Anderson Act. This inference is the only one consistent with the statement that "the Committee intends no preference, for or against the awarding of punitive damages . . . , be inferred from the inclusion of this provision in the bill." Punitive damage awards in accordance with state rules such as in Michigan, Connecticut or Alabama, for example, might be determined permissible, as consistent with the compensatory purpose of the Act. *See* Petition at 15 n.7. Punitive damage awards in accordance with state rules such as in Pennsylvania, however, must be determined to be impermissible, because they are "inconsistent with" that purpose. *See id.* Congress evidently considered that the federal courts, which deal with such state

rules routinely in diversity cases, were in a better position than Congress to make those assessments and ultimate judgments, as the need arose.

Fourth, in the course of their "Statement of the Case," Respondents assert (at 3) that the Price-Anderson Amendments Act of 1988 "did not alter the law of *Silkwood* [*v. Kerr-McGee Corp.*, 464 U.S. 238 (1984)]." That assertion is plainly wrong. In *Silkwood,* Kerr-McGee argued:

> . . . that our ruling in *Pacific Gas & Electric [Co. v. State Energy Resources Conservation & Development Commission,* 461 U.S. 190 (1983)] is dispositive of the issue in this case. Noting that 'regulation can be as effectively exerted through an award of damages as through some form of preventive relief,' Kerr-McGee submits that because the state-authorized award of punitive damages in this case punishes and deters conduct related to radiation hazards, it falls within the prohibited field.

Silkwood, 464 U.S. at 238 (citation omitted).

The Court rejected Kerr-McGee's implied pre-emption argument. The Court acknowledged that in the Atomic Energy Act of 1954, and in the 1959 amendments to that Act, Congress chose to exclude states from regulating the nuclear hazard. 464 U.S. at 250. That choice, however, was not regarded as also signaling a congressional decision to "remove all means of judicial recourse for those injured." 464 U.S. at 251. That Congress had no such intent was made plain by its adoption of the Price-Anderson Act in 1957:

> [I]t is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents.

464 U.S. at 256.

The 1988 amendments to the Price-Anderson Act, coming four years after *Silkwood* was decided, dramatically changed this landscape. In the 1988 amendments, Congress supplanted all state remedies, replacing them with the *federal* "public liability action." And for that federal action, Congress

expressly directed that state-law based rules of decision could serve as substantive federal rules only if they were not "inconsistent with the provisions of" the Price-Anderson Act as a whole. 42 U.S.C. § 2014(hh).

Respondents' assertion (at 3) that the 1988 Price-Anderson amendments "did not alter the law of *Silkwood*" is thus patently wrong. Those amendments altered the very feature of the statutory framework on which the analysis in *Silkwood* depended.

This Court observed, in *Silkwood:*

> [I]t is Kerr-McGee's burden to show that Congress intended to preclude [punitive damage] awards. Yet, the company is unable to point to anything in the legislative history . . . that indicates that punitive damages were not to be allowed.

464 U.S. at 255 (citation omitted). Petitioners here face no such burden, because Congress has now expressly declared that state rules of decision may serve as substantive federal law only to the extent that those state rules are consistent with the financial protection system of the Price-Anderson Act. Petitioners have amply shown that punitive damage claims, when intended solely to punish and deter, are inconsistent with Congress' intent in fashioning the omnibus insurance and indemnity program, and channeling all legal liability to the defined and limited funds. Congress' plain and repeatedly expressed intent, as detailed in the Petition, was to secure the efficient and prompt *compensation* of persons truly injured, and to prevent the transaction costs and delays associated with litigation of issues, such as punishment and deterrence, irrelevant to the real goals of the Price-Anderson Act.

To prevent those clearly expressed goals from being frustrated in this massive litigation, and to prevent that frustration from being repeated in other presently pending and prospective cases, the decision below should be reviewed and corrected now.

CONCLUSION

For the reasons stated above and in the Petition dated February 20, 1996, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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